Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

TOMI WHITE BRYAN, Individually
and on behalf of all others similarly situated,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the Supreme Court's decision in *Grable & Sons,* the Federal Court Lacked Subject-Matter Jurisdiction to Grant Injunctive Relief.

2. Whether the Decision of the Fourth Circuit Conflicts with the Decision of this Court in *Parsons Steel* and Violates Principles of Comity Essential to the Federal System.

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Petitioner Tomi White Bryan ("Bryan") respectfully requests that this Court grant her petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 492 F.3d 231 (4th Cir. 2007) and appears in the Petitioner's Appendix ("Pet. App."). Pet. App. 1a - 22a. The opinion of the United States District Court for the Middle District of North Carolina, Greensboro Division, is unpublished, but is accessible at 2006 U.S. Dist. LEXIS 35650 and appears at Pet. App. 23a – 46a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion and Judgment on July 3, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Petitioner's state court claim was brought pursuant to the North Carolina Unfair and Deceptive Practices Act, North Carolina General Statutes § 75-1.1 ("NCUDPA"). Section 75-1.1(a) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

North Carolina consumers injured by an unfair or deceptive act have standing to sue pursuant to North Carolina General Statutes § 75-16, which provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

The District Court stated that the injunction entered by it barring Petitioner from pursuing her state court claim was issued pursuant to the All Writs Act, 28 U.S.C.A. § 1651(a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In issuing the injunction, the District Court held that the facts of this case brought it within the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court

> except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Fourth Circuit, in affirming the District Court, refused to give full faith and credit to the state court order denying BellSouth's motion to dismiss under the Full Faith and Credit Act, 28 U.S.C.A. § 1738, which provides that the judicial proceedings of any court of any State of the United States:

> shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

This case arises from BellSouth's misrepresentations and failure to disclose material facts relating to BellSouth's Federal Universal Service Charge ("FUSC"). The term "Federal Universal Service Charge" is BellSouth's label for recovering Universal Service Fund contributions from its customers, but it is not a label required by the Federal Communications Commission or one used by all carriers. BellSouth imposes the FUSC on each monthly telephone bill. Bryan, on behalf of herself and others similarly situated, filed her Complaint in North Carolina state court against BellSouth on February 22, 2002. BellSouth removed the case to federal court on March 26, 2002.

Bryan filed her First Amended Complaint in federal court on June 4, 2002, alleging causes of action for BellSouth's violation of the NCUDPA, unjust enrichment/restitution, and breach of contract. Bryan also filed a motion to remand her claims to state court. BellSouth filed a motion to dismiss all claims in the First Amended Complaint, arguing that Bryan's claims were preempted by the "filed-rate doctrine."

On February 6, 2003, the District Court granted BellSouth's motion to dismiss some of Bryan's claims. The District Court found that the claims challenging the FUSC as excessive arose under federal law and were preempted by the filed tariff doctrine. The District Court denied BellSouth's motion to dismiss Bryan's deception claim, finding that claim did not challenge BellSouth's tariff, did not arise under federal law, and was not preempted by the FCA or filed-rate doctrine.

The District Court declined to exercise supplemental jurisdiction over the state law claim for deception and remanded that claim. BellSouth appealed the District Court's decision remanding the state law claim.

BellSouth filed with the District Court and the Fourth Circuit Court of Appeals motions to stay the remand order pending appeal. Both motions were denied, and the case proceeded in state court. The parties conducted substantial discovery on the remanded deception claim. Bryan filed a Second Amended Complaint.

The North Carolina Superior Court, Guilford County, denied BellSouth's motion to refer the case to

the FCC pursuant to the primary jurisdiction doctrine. Further, on October 30, 2003, the state trial court certified a class of North Carolina consumers to pursue the claim under the NCUDPA.

On July 28, 2004, the Court of Appeals reversed the District Court's remand order. The Court of Appeals decided that Bryan's deception claim under Count A of the federal complaint arose under federal law because the damage claim, in its view, sought a refund of the USF surcharges, which implicated BellSouth's tariff. The Court of Appeals ordered the claim in Count A dismissed. The panel split its decision 2-1, with the Honorable J. Michael Luttig dissenting. *Bryan v. BellSouth*, 377 F.3d 424 (4th Cir. 2004) (*Bryan I*).

On February 8, 2005, in accordance with the mandate of the Court of Appeals, the District Court dismissed Count A of the federal court First Amended Complaint.

On March 18, 2005, BellSouth moved in state court to dismiss Bryan's complaint pursuant to Rule 12(b)(6), arguing that the federal dismissal of Count A of the amended federal complaint was *res judicata* on the issue of Bryan's right to pursue her unfair trade practices claim under the amended state complaint.

By order entered on May 6, 2005, the state court denied BellSouth's motion to dismiss. BellSouth appealed this decision to the North Carolina Court of Appeals.

On September 20, 2005, BellSouth filed a motion in the United States District Court seeking an injunction prohibiting Bryan from pursuing her state court action.

On May 31, 2006, the District Court granted the injunction on the ground that the state court proceedings were rendered a nullity by the Fourth Circuit's vacatur of the District Court's prior remand order. Bryan appealed this ruling to the Fourth Circuit on June 28, 2006.

On July 3, 2007, the Court of Appeals affirmed the District Court on the basis of the relitigation exception to the Anti-Injunction Act, agreeing with BellSouth's *res judicata* argument, but did not find that the Court of Appeals' vacatur of the remand order rendered the ensuing state court proceedings a nullity.

FACTUAL BACKGROUND

The Universal Service Fund ("USF") was created by Congress to provide funding for telecommunications services to rural areas, schools, libraries, and health care providers. 47 U.S.C. § 254. All carriers providing interstate telecommunications to the public, including BellSouth, are required to contribute to the USF. 47 C.F.R. § 54.706. The Federal Communications Commission ("FCC") administers the USF and funds it through an assessment on carriers. Each quarter, the FCC establishes a uniform Contribution Factor, expressed as a percentage, that carriers must contribute to the USF. 47 C.F.R. § 54.709 (a). For a local exchange carrier such as BellSouth, interstate revenues consist of monthly subscriber line charges to its end-user customers. *Report and Order and Second Further Notice*

of Proposed Rulemaking, FCC 02-329, 17 F.C.C.R. 24952, December 13, 2002, ¶ 51, n. 131 ("*FCC Order of December 13, 2002*").

The FCA requires that all carrier charges and practices must be just and reasonable. 47 U.S.C. § 201(b). The FCC has jurisdiction to enact rules to ensure compliance by the carriers. *FCC Order of December 13, 2002*, ¶ 8. Until recently, many carriers, including BellSouth, charged their customers USF recovery fees exceeding the Contribution Factor imposed on the carriers by the FCC. *FCC Order of December 13, 2002*, ¶ 47, n. 125. Further, the USF recovery practices among the carriers varied widely, causing consumer confusion about the amount and nature of the charge. *Id.* at ¶¶ 43-63. The FCC has stated: "This discrepancy between the contribution and the amount carriers charge customers is inexplicable to the casual observer." *In re Federal-State Joint Board on Universal Service*, FCC 01-0145, Notice of Proposed Rulemaking, May 8, 2001, ¶ 5. In effect, the carriers turned an FCC fee into a profit center by marking up the fee and imposing it on their customers.

In December 2002, after Bryan filed her First Amended Complaint and the briefing on the remand issues had been submitted to the District Court, the FCC banned USF mark-ups as a line item. *FCC Order of December 13, 2002*, ¶ 49. The ban took effect on April 1, 2003. *Id.* at ¶ 51. Though the FCC's ban was prospective, the FCC necessarily determined that USF surcharges in excess of the Contribution Factor are unreasonable and violate § 201(b) of the FCA. *FCC Order of December 13, 2002*, ¶ 43.

The FCC does not require carriers to recover their USF contributions from customers. "Each company makes a business decision about whether and how to assess customers to recover Universal Service costs." *Universal Service Fund Increases: What Every Consumer Should Know, FCC Consumer Fact Sheet, fcc.gov website,* October 30, 2004; *see also In The Matter of Truth-In-Billing And Billing Format*, FCC 99-72, First Report and Order and Further Notice of Proposed Rulemaking, May 11, 1999, 14 F.C.C.R. 7492, ¶ 57 ("*Truth-In-Billing Order*"). Before banning USF mark-ups, the FCC determined that

> we would not consider a description of that [USF] charge as being "mandated" by the Commission or the federal government to be accurate . . . Accordingly, to state or imply that a carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading.

Truth-In-Billing Order, at ¶ 57. Moreover, carriers "must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge." *Universal Service Order*, 12 F.C.C.R. 8776, 9211-12 ¶ 855 (1997).

All of Bryan's claims challenging BellSouth's FUSC as excessive have been dismissed. In the remaining state court deception claim, Bryan alleges BellSouth has

misrepresented facts and failed to disclose material information regarding its FUSC. BellSouth's deception prevented consumers from adequately comparing the cost of various telephone services and packages because BellSouth led consumers to believe its FUSC was government-mandated and that all carriers therefore imposed the same fee on their customers. Bryan seeks to recover damages on behalf of herself and similarly situated North Carolina customers as a result of these deceptive acts. Bryan is not seeking to rewrite BellSouth's tariffs or to enforce a promised rate that differs from the tariff.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for a writ of certiorari for two reasons.

First, under recent decisions of this Court, including *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308; 125 S. Ct. 2363; 162 L. Ed. 2d 257 (2005), it is apparent that federal subject-matter jurisdiction is lacking in this case, rendering null and void the injunction order that was affirmed by the Court of Appeals.

Second, the decision of the Court of Appeals conflicts with the decision of this Court in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986), and violates the principles of comity recognized in *Parsons Steel* and protected by the Anti-Injunction Statute, 28 U.S.C. § 2283, and the Full Faith and Credit Act, 28 U.S.C.A. § 1738.

I. FEDERAL SUBJECT-MATTER JURISDICTION IS LACKING AND THEREFORE THE INJUNCTION ISSUED BY THE DISTRICT COURT IS NULL AND VOID.

In *Bryan I*, the Fourth Circuit Court of Appeals determined that Bryan's amended complaint arose under federal law because it presented a substantial question of federal law. 377 F.2d at 432. The Court of Appeals' decision was issued on July 28, 2004. Subsequent to that opinion, the Supreme Court issued the seminal decision in *Grable & Sons*, which narrowly defined the scope of federal question jurisdiction when, as here, the plaintiff has not pleaded a federal cause of action. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308; 125 S. Ct. 2363; 162 L. Ed. 2d 257 (2005). Under *Grable & Sons* and its progeny, there is no federal subject-matter jurisdiction in this case.

In *Grable & Sons*, the Court framed the critical inquiry as follows: "[D]oes a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314. "As early as 1912, this Court had confined federal-question jurisdiction over state-law claims to those that 'really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law'." 545 U.S. at 313 (*quoting Shulthis v.*

McDougal, 225 U.S. 561, 569, 56 L. Ed. 1205, 32 S. Ct. 704 (1912).

At issue in this case is whether Bryan's deception claim under the NCUDAP "necessarily" raises a stated federal issue, actually disputed and substantial. Bryan submits that her claim does not. BellSouth argues that Bryan's deception claim conflicts with the tariff it filed with the FCC because any damages awarded to Bryan or the putative class would essentially constitute a refund of the tariff. Bellsouth also contends that Bryan is essentially asking a state court to determine whether its filed tariff is reasonable. For the reasons that follow, however, these contentions are without merit.

First, nowhere in the Complaint does Bryan seek a "refund" of all or a portion of the filed rate. As the Court of Appeals wrote, "[i]n actuality, Bryan does not specify the nature of her damages in Count A." 377 F.2d at 430. Subject-matter jurisdiction cannot be premised on a theory the plaintiff has not advanced. *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 809 n. 6, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). It is important that the First Amended Complaint was dismissed by the District Court under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Moreover, federal question jurisdiction cannot rest upon a preemption defense. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Therefore, Bryan's complaint does not "necessarily" raise a stated federal issue, so the first prong of the *Grable & Sons'* test is not met.

BellSouth will necessarily argue that the complaint raises a federal issue, actual and disputed. However, the FCC already has determined that USF mark-ups such as those imposed by BellSouth on its customers are unreasonable. *FCC Order of December 13, 2002*, ¶ 49. Moreover, the FCC also determined that carrier invoices that imply that USF charges are mandated by the government constitute a misrepresentation:

> A full, accurate and non-misleading description of the charge would be consistent with our guideline. In contrast, we would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate. Instead, it is the carriers' business decision whether, how, and how much of such costs they choose to recover directly from consumers through separately identifiable charges. Accordingly, to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading.

Truth-in-Billing Order at ¶ 57; *see* Universal Service Order, 12 FCC Rcd 8776, 9211-12 ¶ 855 (1997) (noting that carriers "must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge").

The FCC recently reaffirmed this view: "We conclude it is unreasonable to describe an amount as a universal service regulatory fee when that amount varies from the contribution factor mandated by the regulator." *FCC Order of December 13, 2002, at ¶ 54.* The FCC also stated that the filed-rate doctrine does not apply to a carrier's public disclosure requirements because those requirements are not part of the filed rate. *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace,* FCC 99-47, 14 FCC Rec. 6004, March 31, 1999, ¶ 17.

The filed rate is the amount to be charged, not the ancillary disclosures necessary to prevent deception of consumers. BellSouth has conceded that its tariff does not address the billing and marketing practices at the heart of Petitioner's UDAP claim. 377 F.2d at 435. Bryan does not seek to repudiate the FCC's rate-making authority; to the contrary, Bryan seeks to uphold the FCC's determinations through enforcement of state laws protecting consumers. Because BellSouth's tariff does not encompass consumer disclosures, as the FCC determined and as BellSouth has admitted, there is no actual and disputed federal question *necessarily* to be addressed in deciding Bryan's claim.

Finally, the exercise of federal jurisdiction in this case will unnecessarily intrude upon the state court's right and ability to protect consumers from deception. Certainly it cannot be said that Congress intended for these types of claims to be pursued in federal court. The FCA contains a savings clause preserving all state law claims. 47 U.S.C. § 414. Thus, Congress clearly did not intend for the FCA to completely preempt all state law

causes of action. *Smith v. GTE Corp.*, 236 F.3d 1292, 1312-13 (11th Cir. 2001). The majority of courts that have addressed preemption in the wire-line context have held that Congress did not intend the FCA to completely preempt state law claims so as to make them removable. *E.g., Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2nd Cir. 2000) ("In the FCA context, we have ruled that the 'complete preemption' doctrine does not apply with respect to state law billing claims."); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633 (6th Cir. 1987) (claims for misrepresentation and deception are not federal in character, even though a filed rate is involved); *Russell v. Sprint Corp.*, 2003 U.S. Dist. LEXIS 8852 n. 1 (D. Kan. May 22, 2003) (collecting cases).

Subsequent to *Grable & Sons*, the Court decided *Empire HealthChoice Assur., Inc. v. McVeigh*, __ U.S. __, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006). In that case, the plaintiff argued that because its contract was secured solely as a result of a federal statute, its claims for subrogation necessarily involved a substantial and disputed question of federal law. The Court carefully analyzed the federal subject-matter jurisdiction issue:

> True, distinctly federal interests are involved. Principally, reimbursements are credited to a federal fund, and the OPM-BCBSA master contract could be described as "federal in nature" because it is negotiated by a federal agency and concerns federal employees. But, as in *Jackson Transit*, countervailing considerations control. Among them, the reimbursement right in question, predicated

> on a FEHBA-authorized contract, is not a prescription of federal law.

__ U.S. at __, 126 S. Ct. at 2134, 165 L. Ed. 2d at 147. The Court held that *Grable & Sons* was not so expansive and that the subrogation claims were traditionally brought and adjudicated in state court.

Similarly, BellSouth argues that the deception claim necessarily tramples upon the tariff. Although the tariff is a federal interest and BellSouth remits some of the universal service charge it collects from customers, the FCC has determined that the disclosures accompanying BellSouth's billing and its description of the charge as a federal fee are *not* federal interests. Deception claims like that contained in Bryan's first amended complaint are traditionally adjudicated in state court, and although those claims arise out of misrepresentations concerning a federal tariff, they do not require the resolution of any substantial and disputed federal question. To find federal subject-matter jurisdiction in this case would expand federal question jurisdiction far beyond the Court's recent pronouncements in *Grable & Sons* and *Empire HealthChoice*.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *PARSONS STEEL* AND VIOLATES THE PRINCIPLES OF COMITY ESSENTIAL TO THE FEDERAL SYSTEM.

The District Court stated that if its decision had turned on BellSouth's *res judicata* argument, it would have been inclined to deny the injunction out of respect for principles of comity. Pet. App. at 45a. The District

Court instead rested its opinion on BellSouth's alternate argument that the Court of Appeals' vacatur of the remand order rendered that order a nullity, and retroactively divested the state court of jurisdiction. Pet. App. at 45a. It is notable that, after the case was remanded to state court, the parties conducted substantial discovery and proceedings. BellSouth requested that the case be dismissed under the primary jurisdiction doctrine and referred to the FCC, which motion was denied by the state court. Moreover, the state court certified a class of BellSouth consumers. Despite the extensive activity undertaken in the state court after the remand, the District Court concluded that the injunctive relief "minimally offends notions of comity and federalism," based on its conclusion that the vacated remand order resulted in retroactive nullification of the jurisdiction that the state court unquestionably acquired when the case was remanded. *Id.*

On appeal, by contrast, the Fourth Circuit refused to endorse the "nullification" argument relied upon by the District Court and BellSouth, finding it problematic, and instead based its decision on the *res judicata* argument rejected by the District Court. In so doing, the Fourth Circuit failed to give due regard to the state court's prior determination of this issue.

The Fourth Circuit acknowledged the potential conflict between the exercise of injunctive power under the relitigation exception to the Anti-Injunction Act and the federal court's obligations under the Full Faith and Credit Act. Pet. App. at 16a. Nonetheless, the Court then failed to give proper weight to the state court's determination of the *res judicata* issue. The decision of

the Court of Appeals was directly contrary to this Court's decision in *Parsons Steel, supra,* which recognized that even when the relitigation exception was applicable, "important values of federalism and comity embodied in the Full Faith and Credit Act" dictate that an injunction may not issue once the state court has ruled on the merits of the *res judicata* issue and decided it against the party seeking the injunction:

> We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue.

474 U.S. at 523-24, 106 S. Ct. at 771-72, 88 L. Ed. 2d at 883-84.

Furthermore, in *Parsons Steel* this Court made clear that under the circumstances of this case, the District Court was not the proper forum within which to challenge the correctness of the trial court's decision on the *res judicata* issue:

> Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particular the state court's resolution of the res judicata issue, the same

> preclusive effect it would have had in another court of the same state. *Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.*

474 U.S. at 525, 106 S. Ct. at 772-73, 88 L. Ed. 2d at 884-85 (emphasis added).

As did the respondents in *Parsons Steel*, BellSouth "chose to fight out the *res judicata* issue in state court first, and only after losing there did they return to federal court for another try." 474 U.S. at 524, 106 S. Ct. at 772, 88 L. Ed. 2d at 884. Under *Parsons Steel*, BellSouth is required to pursue its challenge to the correctness of the trial court's determination as to the conclusive effect of the federal judgment within the state-court system, and then by way of a petition for review with the U.S. Supreme Court.

Parsons Steel made clear that the relitigation exception to the Anti-Injunction Statute does not permit a federal court to ignore a prior state court order that decided the very *res judicata* issue upon which the relitigation exception itself is based. Thus, a district court may not enjoin the pursuit of a state claim under the relitigation exception if to do so would fail to give full faith and credit to a prior state court determination on the *res judicata* issue. Yet that is precisely the effect of the decisions by the District Court and the Court of Appeals in this case.

BellSouth, by raising the *res judicata* issue in state court in the first instance by its motion to dismiss, did not have the option of seeking an injunction in the District Court, and the Court of Appeals erred when it upheld the District Court's grant of the injunction.

In order to invoke the "relitigation exception" to the Anti-Injunction Statute's bar, the Court of Appeals disregarded the state court's prior ruling on the *res judicata* issue, in violation of the Full Faith and Credit Act. Under *Parsons Steel*, this it cannot do. The decision of the Court of Appeals upheld a significant intrusion upon the state court's rights and violated the principle of comity that underlies our federal system. Even the District Court recognized the principle, set forth in *Parsons Steel*, that entry of an injunction based on BellSouth's *res judicata* argument would be an improper intrusion into the right of the state court to decide this issue:

> Had this matter turned on the issue of preclusion, the court would have been inclined, in an effort to avoid interfering with the "legitimate activities" of the state, to deny BellSouth's request for injunctive relief.

Pet. App. at 45a.

In summary, BellSouth's resort to the District Court was an improper attempt to challenge the state court's decision on the *res judicata* issue, an issue that BellSouth brought before the state court in the first place by its motion to dismiss. Having elected to raise this issue in state court first, BellSouth invoked the jurisdiction of

the North Carolina courts to decide this issue, and was obligated to pursue any challenge to the state court's decision by way of appeal through the state-court system. By its decision, the Fourth Circuit improperly divested the state court of its right to resolve the issues presented by BellSouth's motion to dismiss, contrary to this Court's decision in *Parsons Steel.*

CONCLUSION

Applying the principles set forth most recently by this Court in *Grable & Sons* and *Empire HealthChoice*, it is apparent that the federal courts lacked subject-matter jurisdiction, and the injunction of the District Court at the heart of this dispute is null and void.

Assuming, *arguendo*, the existence of federal subject matter jurisdiction, the decision of the Court of Appeals conflicts with the decision of this Court in *Parsons Steel* and unnecessarily intrudes into the legitimate activities of the state, thus undermining principles of comity which undergird our federal system. The Fourth Circuit's decision raises issues of signal importance to the jurisdiction of the state and federal courts, and therefore should be reviewed by this Court.

For the foregoing reasons, Petitioner prays that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JULY 3, 2007

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1746

TOMI WHITE BRYAN, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

BELLSOUTH COMMUNICATIONS, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., Senior District Judge. (1:02-cv-00228-FWB)

Argued: March 15, 2007

Decided: July 3, 2007

Before TRAXLER, KING, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge TRAXLER wrote the opinion, in which Judge KING and Judge GREGORY joined.

OPINION

TRAXLER, Circuit Judge.

Tomi Bryan filed in North Carolina state court a putative class action against BellSouth Communications, Inc. After BellSouth removed the action to federal court, the district court rejected three of Bryan's claims on the merits, declined to exercise supplemental jurisdiction over the remaining claim, and remanded that claim to state court. On appeal, we held that the remanded claim was a federal claim that should have been dismissed on the merits as well. *See Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 432 (4th Cir. 2004) (*Bryan I*). Pursuant to our remand, the district court dismissed that claim and entered judgment for BellSouth. BellSouth then filed a motion in state court, arguing that the federal court's dismissal of the claim was entitled to *res judicata* effect and that the state court should dismiss Bryan's action. When the state court denied BellSouth's motion, BellSouth returned to federal court seeking an injunction of the state-court action. The district court granted BellSouth's request and issued an order enjoining further proceedings in state court. Bryan now appeals, arguing that the injunction violated the Anti-Injunction Act. For the reasons set forth below, we affirm.

Appendix A

I.

Interstate telecommunication providers are "required by law to contribute a portion of [their] revenues to the federal Universal Service Fund ('USF') to ensure affordable telecommunications services to rural and low-income areas, schools, hospitals, and the like." *Bryan I*, 377 F.3d at 425. BellSouth recovers its USF contribution from its customers by way of a line item on each bill for a "Federal Universal Service Charge" ("FUSC"). BellSouth's FUSC is established in the tariff that it is required to file with the FCC. Before April 1, 2003, when the FCC prohibited the practice, BellSouth (and other telecommunications carriers) charged its customers more than their proportional share of BellSouth's USF contribution. *See id.* at 425-26.

Bryan initiated a putative class action against BellSouth in North Carolina state court. Bryan alleged that BellSouth's FUSC was excessive and that BellSouth violated North Carolina's Unfair Trade Practices Act by not disclosing to its customers certain information about the FUSC. BellSouth removed the action to federal court, arguing that Bryan's claims amounted to challenges to BellSouth's tariff and were therefore federal claims. Bryan thereafter filed a First Amended Complaint in federal court. The complaint alleged that BellSouth imposed an FUSC that exceeded its required contribution to the USF, that BellSouth did not disclose how it calculated the FUSC, and that BellSouth's use of

the term "Federal Universal Service Charge" was misleading.

Bryan filed a motion to remand the complaint to state court, and BellSouth filed a Rule 12(b) motion to dismiss. BellSouth argued that all of Bryan's claims were barred by the "filed-rate doctrine" in that they challenged BellSouth's filed tariff. *See, e.g., American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (explaining that under the filed rate doctrine, "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." (internal quotation marks omitted)).

The district court concluded that removal was proper because Bryan presented a federal question by directly challenging the terms of a tariff in her allegations that BellSouth's FUSC was excessive. The district court then concluded that two of the three claims asserted in Bryan's complaint must be dismissed under the filed-rate doctrine, because those claims would have the effect of altering the rates set forth in BellSouth's tariff. The district court concluded that the remaining count, "Count A," was simply a state-law unfair trade practices claim. The district court declined to exercise supplemental jurisdiction over that claim and remanded it to state court. BellSouth appealed the district court's refusal to dismiss Count A under the filed-rate doctrine; Bryan did not appeal the dismissal of the other counts.

On appeal, this court concluded that Count A also presented a federal question by challenging the tariff. Because the claim challenged the tariff, we concluded that Count A should have been dismissed under the filed-rate doctrine. We therefore vacated the district court's remand order and directed the district court to dismiss Count A. *See Bryan I*, 377 F.3d at 432. Bryan petitioned the Supreme Court for a writ of *certiorari*, which the Court denied. *See Bryan v. BellSouth Telecomms., Inc.*, 543 U.S. 1187, 125 S.Ct. 1398, 161 L.Ed.2d 190 (2005). On remand, the district court denied Bryan's motion to file an amended complaint and dismissed Count A, entering final judgment in favor of BellSouth.

While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court.[1] The parties engaged in various pre-trial proceedings, Bryan filed an amended complaint, and the North Carolina trial court eventually certified a class of BellSouth customers. The parties thereafter agreed to stay the state court action.

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1. A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U.S.C.A. § 1447(c) (West 2006), or, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered, *see In re Lowe*, 102 F.3d 731, 734-36 (4th Cir. 1996). More than two months after the district court issued its order remanding the single claim to state court, and after the remand had been effectuated, BellSouth moved to stay the remand pending appeal. The district court denied that motion, and a panel of this court likewise denied BellSouth's motion to stay.

After the Supreme Court denied Bryan's petition for *certiorari* in *Bryan I,* BellSouth filed a motion in state court seeking dismissal of Bryan's action. BellSouth argued that when this court vacated the district court's remand order, that rendered the remand order a nullity and deprived the state court of jurisdiction over the case. BellSouth also contended that the action should be dismissed on *res judicata* grounds and by virtue of the filed rate doctrine. The North Carolina court denied the motion to dismiss. BellSouth then returned to federal court seeking an injunction of the state-court proceedings under the All Writs Act. *See* 28 U.S.C.A. § 1651(a) (West 2006).

The district court granted BellSouth's request for an injunction. The court concluded that our prior decision vacating its remand order rendered the remand order a nullity and deprived the state court of jurisdiction over the case. Because the state court had no jurisdiction over the claim, the district court concluded that it was proper to issue an injunction barring further action on the case. It is from that order that Bryan now appeals.

II.

Bryan first contends that the injunction must be vacated because the district court lacked subject matter jurisdiction. She claims that when the district court (after the first appeal) dismissed Count A with prejudice, the case was closed, and nothing remained over which the district court could exercise jurisdiction. Because the All Writs Act does not confer an independent basis for the

court to exercise jurisdiction, Bryan contends that jurisdiction was lacking. We disagree.

As a general rule, courts have jurisdiction to enforce their own judgments. *See Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746, 752 (4th Cir. 2003). The district court clearly had subject matter jurisdiction when it issued the order finally dismissing Count A, and the district court retained jurisdiction to enforce that judgment. *See In re Mooney*, 730 F.2d 367, 374 (5th Cir. 1984) ("[N]o independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. The jurisdiction that the federal court had when it entered its original judgment is enough to support its issuance of an injunction."); *see also Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1013 (8th Cir. 2002) ("As long as the original lawsuit was properly brought in federal court, the federal court retains subject matter jurisdiction to remove any subsequent state law action to federal court for purposes of applying the All Writs Act."). Bryan's claim that the court lacked subject-matter jurisdiction must therefore fail.

III.

We turn now to Bryan's challenges to the injunction issued by the district court under the All Writs Act. The All Writs Act provides that a court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a). Use of the All Writs Act, however, is constrained by the Anti-Injunction Act, which

provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C.A. § 2283 (West 2006). The injunction entered in this case is thus improper unless it falls within the reach of one of the exceptions contained in the Anti-Injunction Act.[2]

The Act's exception for injunctions that are necessary to "protect or effectuate" a court's judgment has come to be known as the relitigation exception. *See In re Am. Honda Motor Co. Dealerships Relations Litig.*, 315 F.3d 417, 440 (4th Cir. 2003). "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). The exception thus permits a court "to enjoin state-court proceedings in order to protect the *res judicata* effects of federal judgments." *Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734, 737 (4th Cir. 1990). An injunction may issue under the relitigation exception

2. The injunction in this case is not directed to the North Carolina court itself, but instead prohibits further prosecution by Bryan and her agents and associates. The Anti-Injunction Act's prohibition against the enjoining of state proceedings, however, extends to injunctions against parties to the state-court litigation. *See In re Am. Honda Motor Co. Dealerships Relations Litigation*, 315 F.3d 417, 439 (4th Cir. 2003).

only if the claims or issues subject to the injunction have actually been decided by the federal court; the exception is inapplicable where an injunction is sought to prevent the litigation of claims or issues that *could have* been decided in the original action but were not. *See Chick Kam Choo*, 486 U.S. at 148, 108 S.Ct. 1684; *LCS Servs., Inc. v. Hamrick*, 925 F.2d 745, 749 (4th Cir. 1991) ("[A] complainant seeking to avail himself of the relitigation exception to the [Anti-Injunction] statute must make a strong and unequivocal showing of relitigation of the same issues." (internal quotation marks omitted)).

A.

Bryan contends that the relitigation exception is inapplicable because the claim she is asserting in state court is not the same as Count A that was dismissed under the filed-rate doctrine by the district court. According to Bryan, the focus of each complaint was substantially different — whereas the federal complaint challenged the FUSC as excessive, challenged the terms of the tariff, and sought to impose a different FUSC, the state court complaint focuses on BellSouth's misrepresentations about the FUSC. Bryan thus contends that the claims are different, such that the relitigation exception to the Anti-Injunction Act does not apply. We disagree.

Contrary to Bryan's assertion, Bryan did *not* explicitly challenge BellSouth's tariff or seek to impose a different FUSC in Count A of her federal complaint. Instead, we concluded in *Bryan I* that Bryan's

allegations in Count A had the *legal effect* of challenging or seeking to change the terms of BellSouth's tariff. Thus, the fact that Bryan in her state court complaint does not explicitly challenge BellSouth's tariff or seek to vary the terms of the tariff is not enough to establish that the state court complaint and Count A of the federal complaint involve different claims.

In her complaint in federal court, Bryan claimed that BellSouth's charging and collecting of the FUSC were unfair trade practices under North Carolina law. Bryan also alleged that BellSouth's failure to disclose how it calculates the FUSC or disclose that the FUSC includes administrative costs and profit amounted to unfair trade practices. In the state-court complaint, Bryan omitted any reference to BellSouth's charging or collecting of the FUSC as constituting an unfair trade practice, alleging instead that BellSouth's various failures to fully disclose the relevant aspects of its FUSC amounted to unfair trade practices. An examination of the basis for our opinion in *Bryan I* will demonstrate that these changes to the claim asserted in state court are not enough to render the relitigation exception inapplicable.

In *Bryan I*, we explained why Count A was barred by the filed-rate doctrine:

> BellSouth maintains that it does, asserting that, because Count A seeks damages, the court, were Bryan successful, would be put in the position of effectively refunding a portion

of the FUSC to Bryan. In the circumstances presented, we are constrained to agree.

In Count A, Bryan alleges that BellSouth's charging and collecting of the FUSC and its failure to make certain disclosures in connection therewith constitute unfair or deceptive acts or practices under North Carolina General Statute section 75-1.1. . . . Bryan's prayer for damages draws no distinction between her separate counts. With no indication to the contrary, we must view Part V as seeking monetary damages for the acts alleged in Count A.

BellSouth asserts that the monetary remedy Bryan seeks is "a refund of that portion of the FUSC that she considers she was wrongfully induced to pay" and that, in seeking such a remedy, Bryan runs afoul of the filed-rate doctrine. In actuality, Bryan does not specify the nature of her damages in Count A. Nonetheless, BellSouth maintains that any award of damages flowing from BellSouth to Bryan, no matter how calculated, would violate the filed-rate doctrine by refunding a portion of the FUSC to some consumers but not to others and by requiring the court to determine a reasonable rate. . . .

In our view, the Complaint — read in the light most favorable to the plaintiff — nowhere

> purports to seek any form of damages other than a refund of some portion of the FUSC. And it pleads no facts that would put BellSouth on notice that Bryan intends to seek damages resulting from any injury other than paying the FUSC. In the "FACTS" section of the Complaint, Bryan alleges only that she is a BellSouth customer who was charged and paid the FUSC, that BellSouth charged an FUSC that was excessive, that it failed to disclose how the FUSC was calculated, and that its use of the term "FUSC" was misleading.

Bryan I, 377 F.3d at 430-31. As this passage demonstrates, the nature of the damages sought by Bryan was key to the filed-rate question. We concluded that the complaint could only be understood as seeking a refund of a portion of the FUSC. And because other BellSouth customers would not receive such a refund, Bryan's claim ran afoul of the filed-rate doctrine.

While Bryan in her state-court complaint omitted claims that the FUSC was excessive, nothing about the nature of her damages claim has changed. Her allegations in the damages section are the same as they were in the federal complaint,[3] and both complaints

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3. In the federal complaint, Bryan alleged that "BellSouth's actions and omissions have been an actual, producing, direct and proximate cause of damages to Plaintiff and to BellSouth's other North Carolina customers in an amount exceeding $10,000." J.A. 20. The allegation in the state complaint is identical. *See* J.A. 64.

include numerous allegations about misrepresentations by BellSouth. Bryan alleges that BellSouth's FUSC charge was more than its contribution to the USF, and she alleges that she is entitled to damages. Just as with the federal complaint, there is nothing in Bryan's state court complaint that would put BellSouth on notice that Bryan intends to seek damages resulting from any injury other than the paying of the FUSC.

In *Bryan I*, we rejected Bryan's argument that it was possible for her to recover damages that did not amount to a refund of the FUSC:

> At argument, Bryan asserted that one could envision an award of damages that would not challenge the filed tariff. She posited that if BellSouth had fully disclosed all information pertaining to its FUSC, she might have chosen a different carrier that would have charged a lower FUSC, and therefore she would have been damaged in the amount of the difference between the two carriers' FUSCs. Such an award of damages, Bryan maintained, would not require the court to determine the reasonableness of BellSouth's FUSC and therefore would neither present a federal question nor be barred by the filed-rate doctrine. This example is purely hypothetical, however, and nothing in the Complaint suggests such an injury.

Id. at 431. Just as there were no allegations in the federal complaint to support this theory, there is nothing in the state-court complaint that would support this theory of liability. In fact, the state court's order certifying the class demonstrates that Bryan is *not* seeking damages under this theory of liability. The certification order discusses the "damage models" that Bryan identified in her interrogatory responses:

> Plaintiff has set forth two damage models which she believes would be appropriate. These are: (a) The total of all monthly FUSC amounts billed to Plaintiff and every other Class member, which total sum is then trebled [under the North Carolina Unfair Trade Practices Act]; and (b) The difference between (i) the total of all monthly FUSC amounts billed to Plaintiff and every other Class member and (ii) the total of the relevant contribution factor times (x) the interstate portion of charges for telecommunications service on each customer's bill for Plaintiff and every other Class member for every month that there was an FUSC billed. The "difference" is then trebled. *Plaintiff does not claim that she is entitled to recover the difference between the federal universal service fees charged by other local carriers and the amount of BellSouth's FUSC.* Another measure of damages may be the difference

> between the amount charged and the amount authorized by the FCC.

J.A. 78-79 (emphasis added).

As the allegations in her complaint and the certification order demonstrate, Bryan in her state-court action is seeking damages in the form of a refund of the FUSC paid by North Carolina BellSouth customers. The claim asserted in state court is therefore functionally identical to Count A of the federal action. Because Bryan in the state-court action is seeking to litigate the very claim that we have concluded must be dismissed under the filed-rate doctrine, the requirements for the relitigation exception to the Anti-Injunction Act are satisfied.

B.

Although we have concluded that the requirements for application of the relitigation exception have been satisfied, that does not necessarily mean it would be proper to enjoin the state proceedings. As mentioned previously, BellSouth filed a motion to dismiss with the state trial court, arguing that the district court's order dismissing Count A under the filed-rate doctrine must be given *res judicata* effect and that the state-court action must therefore be dismissed. The trial court denied the motion.[4]

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4. BellSouth has appealed that order. As of the date of this opinion, the state appeals court has not issued an opinion.

In cases where the state court has in a final order rejected the claim that the prior federal order must be given *res judicata* effect, the Full Faith and Credit Act requires federal courts to respect that state court order by refusing to enjoin the state proceedings. As the Supreme Court has explained, the Anti-Injunction Act does not create an exception to the requirements of the Full Faith and Credit Act:

> We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 524, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986).

In this case, the North Carolina court has rejected BellSouth's *res judicata* claim by denying its motion to dismiss. Under *Parsons Steel*, then, we must consider whether *that* decision (the decision of the North Carolina court) is itself entitled to *res judicata* effect under North Carolina law.

Under North Carolina law, a claim is barred by *res judicata* if there is "(1) a *final judgment* on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Erler v. Aon Risks Servs., Inc. of the Carolinas,* 141 N.C.App. 312, 540 S.E.2d 65, 68 (2000) (emphasis added). An order denying a Rule 12(b)(6) motion to dismiss is *not* a final order. *See O'Neill v. Southern Nat'l Bank,* 40 N.C.App. 227, 252 S.E.2d 231, 234 (1979) (explaining that "the denial of a Rule 12(b)(6) motion to dismiss is not a final judgment or order"); *Allen v. Stone,* 161 N.C.App. 519, 588 S.E.2d 495, 497 (2003) ("[T]he denial of a motion to dismiss pursuant to Rule 12(b)(6) merely continues the action in the trial court for further litigation.").

Thus, under North Carolina law, the state-court order in this case denying BellSouth's motion to dismiss is not a final order and is not entitled to *res judicata* effect. *See Branch v. Carolina Shoe Co.,* 172 N.C.App. 511, 616 S.E.2d 378, 383 (2005) ("Since the 20 March 2002 decision was not a final judgment on the merits, but rather an interlocutory decision, the doctrine of *res judicata* does not apply."). Accordingly, the issuance of an injunction in this case is not barred by *Parsons Steel.*

C.

As the analysis set forth above demonstrates, an injunction against further prosecution of Bryan's state-court action is consistent with the All Writs Act, the Anti-Injunction Act, and the Full Faith and Credit Clause.

The district court in this case, however, did not follow this precise path.

When seeking an injunction against Bryan's continued prosecution of Count A in state court, BellSouth made two arguments: the state-court suit is barred by claim and issue preclusion, and the state-court proceedings became a "nullity" once this court vacated the district court's remand of Count A. The district court agreed with BellSouth on the nullity argument, and the court thus did not consider BellSouth's other argument.

BellSouth's contention that the state-court proceedings became a nullity after our decision in *Bryan I* goes along the following path. The vacating of an order deprives the order of any effect. *See, e.g., United States v. Martin*, 378 F.3d 353, 358 (4th Cir. 2004) (explaining that vacate "means to render an act void; as, to vacate an entry of record, or a judgment" (internal quotation marks and alteration omitted)). Thus, when the district court's order remanding Count A was vacated on appeal, it was as if there were never an order remanding Count A to state court. And without a remand order, the state court lacked jurisdiction, because removal deprives a state court of jurisdiction and requires the state court to cease all actions in the case. *See, e.g., National S.S. Co. v. Tugman*, 106 U.S. 118, 122, 1 S.Ct. 58, 27 L.Ed. 87 (1882) (explaining that once a case is removed to federal court, "the jurisdiction of the State Court absolutely ceased . . . [and][t]he duty of the State Court was to proceed no further in the cause").

BellSouth's nullity argument gives us pause. The North Carolina state courts quite clearly lost jurisdiction when BellSouth removed the case to federal court. However, it is just as clear that the state court regained jurisdiction when the district court remanded Count A to state court. *See* 28 U.S.C.A. § 1447(c) (West 2006) (providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court). While a vacated order generally has no effect, we are not as confident as BellSouth that our vacatur of the district court's remand order somehow retroactively deprived the state courts of jurisdiction that was returned to them by the district court.[5] After all, we did not conclude in *Bryan I* that

5. BellSouth also bases its nullity argument in part on language from various cases suggesting that if a remand order is reversed, everything that happened in state court before the reversal would be for naught. *See, e.g., Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991) ("Remands are effective immediately, so state courts may get back to work on the cases. An appellate order a year or more later may render this effort wasted. . . ."); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 491 (5th Cir. 1987) ("Appellate review of remand orders . . . is necessarily inefficient because of its peculiar binary quality: Either the remand is affirmed, in which case the appeal itself was a waste because it had no effect on the on-going state case; or the remand is reversed, in which case progress made in the state court proceedings may be nullified and the parties forced to restart in federal court."). We find nothing in the language of these cases that supports BellSouth's view that the reversal of a remand order retroactively deprives the state court of jurisdiction or renders any state court orders void *ab initio*. Instead, the cases seem to suggest only that the reversal of a remand order may result in the nullification of the proceedings in state court by virtue of the Supremacy Clause. *See* U.S. Const. art. VI cl. 2.

federal courts had exclusive jurisdiction over Bryan's claim. Instead, the claim against BellSouth was one over which state and federal courts have concurrent jurisdiction, with the filed-rate doctrine providing the rule of decision in either forum. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) ("[T]he filed rate doctrine applies not only to the federal-court review . . . but also to decisions of state courts. In this application, the doctrine is not a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies, but a matter of enforcing the Supremacy Clause.").

To say that when an order is vacated it is as if the order never existed is a convenient way of describing the effect of the vacatur. When the case has always been and will remain in a single court system, that shorthand description of the result quickly conveys to the parties that the vacatur of the decision returns the parties to their original positions, before the now-vacated order was issued. But when a case has moved from the federal to the state court system, significant issues of comity arise. To conclude that a decision by a federal appeals court vacating a federal district court judgment retroactively invalidates state court proceedings that up until the moment of vacatur were entirely lawful and proper would perhaps be giving the state court system less respect than it is due.

We need not, however, resolve this difficult issue. Although the district court enjoined the state

proceedings in large part because it viewed those proceedings as having been a nullity, the injunction was proper, as outlined above, under the relitigation exception to the Anti-Injunction Act. *See Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 361 n. 3 (4th Cir. 1994) ("We have consistently recognized that, even though we disagree with the reasoning of the district court, we may affirm the result on different grounds if fully supported by the record.").

We recognize that the district court suggested that it would not have enjoined the state court proceedings had they not been void.[6] Because the decision to enjoin a state court proceeding under the All Writs Act is a

6. When addressing Bryan's argument that the state-court claim was not the same as the dismissed Count A, the district court stated:

> *Had this matter turned on the issue of preclusion, the court would have been inclined,* in an effort to avoid interfering with the "legitimate activities" of the state, *to deny BellSouth's request for injunctive relief.* Comity concerns for the activities of the state, however, are significantly lessened by the court's determination that those activities are null and without effect. Therefore, in this case, injunctive relief minimally offends notions of comity and federalism, while fulfilling the court's obligation to exercise its jurisdiction, vindicate its authority, and protect its judgments.

J.A. 152 (emphasis added and internal citations omitted). The relitigation exception, of course, does turn on questions of preclusion.

discretionary one, *see, e.g., In re March*, 988 F.2d 498, 500 (4th Cir. 1993), our disagreement with the manner in which the district court approached the question might, in another case, require us to remand to the district court for reconsideration of the issue. As discussed above, we concluded in *Bryan I* that, in light of the damages sought by Bryan, the filed-rate doctrine prevented the granting of any relief on Count A. In the state-court action, Bryan seeks precisely the same damages on a claim that is in all respects identical to the claim dismissed by this court. In our view, it would be an abuse of discretion to permit Bryan to continue to prosecute a claim that, as a matter of federal law, is invalid and cannot support the award of any damages. We therefore do not believe that, given the particular circumstances of this case, the district court's skepticism about the relitigation exception prevents us from affirming the court's decision to enjoin the state court proceedings.

IV.

Accordingly, for the foregoing reasons, we hereby affirm the district court's decision to enjoin Bryan from further prosecuting the state court action.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA FILED MAY 31, 2006

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

CIVIL NO. 1:02CV00228

TOMI WHITE BRYAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant.

MEMORANDUM OPINION

BULLOCK, District Judge

On September 20, 2005, Defendant, BellSouth Telecommunications, Inc. ("BellSouth"), filed a motion for injunctive relief to prevent Plaintiff, Tomi White Bryan ("Bryan"), individually and on behalf of all others similarly situated, from pursuing her claim under the North Carolina Unfair and Deceptive Trade Practices

Act ("UDTPA"), N.C. Gen. Stat. §§ 75-1.1, *et seq.*, in state court. In response, Bryan filed a motion to dismiss BellSouth's motion for permanent injunction. For the reasons set forth below, Bryan's motion to dismiss will be denied, and BellSouth's motion for injunctive relief will be granted.

FACTS

On February 22, 2002, Bryan filed suit in the Superior Court of Guilford County, North Carolina, against BellSouth alleging three state law causes of action.[1] BellSouth properly removed the suit to the Middle District of North Carolina, pursuant to 28 U.S.C. §§ 1441 and 1446, on the basis that Bryan's claims raised

1. Bryan sought to represent a class of individuals who are BellSouth customers and who paid a BellSouth fee denoted as the Federal Universal Service Charge ("FUSC"). As a provider of interstate public telecommunications services, BellSouth is required by law to contribute a portion of its revenues to the federal Universal Service Fund ("USF"). *See* 47 U.S.C. § 254; *Bryan v. BellSouth Commc'ns*, 377 F.3d 424, 425 (4th Cir. 2004). The Federal Communications Commission ("FCC") permits carriers such as BellSouth to recover their contributions to the USF from their customers, either through increased rates or through a separate line item on the customers' bills. *Bryan*, 377 F.3d at 425. Billing practices such as recovery of USF contributions are established in a carrier's "Schedule of Charges," also known as its "tariff." *See* 47 U.S.C. § 203; *Bryan*, 377 F.3d at 426. A carrier's tariff must be filed with the FCC and kept open for public inspection. 47 U.S.C. § 203(a); *Bryan*, 377 F.3d at 426. BellSouth recovered its USF contribution through a line item fee labeled as the FUSC on its customers' bills. *Bryan*, 377 F.3d at 426.

federal questions by challenging BellSouth's tariff. On June 4, 2002, Bryan filed her First Amended Complaint in federal court, challenging Defendant's collection of an allegedly excessive Federal Universal Service Charge ("FUSC") from its North Carolina customers as well as the imposition of charges without full disclosure of all material facts surrounding the charge. The First Amended Complaint, like the original complaint, included three causes of action: (1) a claim for violation of the UDTPA ("Count A"); (2) a claim for unjust enrichment and restitution ("Count B"); and (3) a claim for breach of contract ("Count C").

On June 10, 2002, Bryan filed a motion to remand the suit to state court. On July 3, 2002, BellSouth filed a motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint for failure to state a claim upon which relief can be granted. In considering those motions, the court first analyzed its jurisdiction, deciding that the unjust enrichment and restitution claim (Count B) and the breach of contract claim (Count C) directly challenged the validity of a rate contained in a tariff and, therefore, raised federal questions. The court also concluded that Bryan's claims alleging misrepresentations and failure to disclose certain information (Count A) did not attack the validity of the tariff and, therefore, were styled appropriately as state law claims. Nevertheless, the state law claims in Count A fell under the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.

The court then turned to BellSouth's 12(b)(6) motion. Based on the filed-rate doctrine,[2] the court dismissed those claims (Counts B and C) that it concluded arose under federal law by challenging the tariff. Left only with what it considered to be a purely state law matter, the court declined to exercise supplemental jurisdiction over Count A and remanded it to state court.

On March 10, 2003, BellSouth appealed from the portion of the court's Order denying dismissal of Count A and remanding it to state court. BellSouth argued that Count A also challenged the tariff, arose under federal law, and should have been dismissed as barred by the filed-rate doctrine. While on appeal, the action on the remanded UDTPA claim proceeded in the Superior Court of Guilford County. On August 8, 2003, Bryan filed a Second Amended Complaint in that court. On April 28, 2004, stipulated orders were entered in state court staying those proceedings until October 16, 2004.

On February 24, 2004, the Fourth Circuit heard oral arguments of the parties. A majority of the circuit court panel agreed with BellSouth. On July 28, 2004, the Fourth Circuit vacated the district court's February 6, 2003 Order with respect to Count A and remanded the case to the district court with instructions to dismiss. On October 13, 2004, BellSouth filed a motion for entry of final judgment in district court. On November 15, 2004,

2. The filed-rate doctrine, also known as the filed-tariff doctrine, prohibits suits that would have the effect of altering the rates set forth in a carrier's filed tariff. *Bryan*, 377 F.3d at 429.

Bryan filed a motion for leave to file a second amended complaint.[3] On February 8, 2005, the district court denied Bryan's motion to file a second amended complaint and granted BellSouth's motion for entry of final judgment, dismissing Count A per the Fourth Circuit's instructions and dismissing the case with prejudice.

On March 18, 2005, BellSouth filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) in the Superior Court of Guilford County, asserting that the state action was barred by the principles of res judicata and collateral estoppel. Alternatively, BellSouth argued that, by virtue of the district court's vacated remand Order, the state court no longer had jurisdiction over the matter. On May 6, 2005, the Superior Court of Guilford County denied BellSouth's motion to dismiss. BellSouth subsequently filed a protective notice of appeal with the Court of Appeals of North Carolina.

This matter is before the court on BellSouth's Motion for Permanent Injunction and Bryan's Motion to Dismiss Defendant's Motion for Permanent Injunction.

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3. That complaint actually would have been Bryan's third amended complaint because Bryan already had filed a second amended complaint in state court.

Appendix B

DISCUSSION

I. BellSouth's Motion for Permanent Injunction

A. *Anti-Injunction and All Writs Acts*

The Anti-Injunction Act provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act absolutely prohibits "enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions." *Atl. Coast Line R.R. v. Locomotive Eng'rs* 398 U.S. 281, 286-87, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *see also Bluefield Cmty. Hosp., Inc. v. Anziulewicz,* 737 F.2d 405, 408 (4th Cir. 1984). "The exceptions are construed narrowly, however, and are 'not [to] be enlarged by loose statutory construction.'" *Employers Res. Mgmt. Co. v. Shannon,* 65 F.3d 1126, 1130 (4th Cir. 1995) (quoting *Atl. Coast Line,* 398 U.S. at 287)). Moreover, "the Act 'cannot be evaded' by framing an injunction as a restraint on a party rather than directly on the state court." *Denny's, Inc. v. Cake,* 364 F.3d 521, 528 n. 8 (4th Cir. 2004) (quoting *Atl. Coast Line,* 398 U.S. at 287).

Specific reference to the Anti-Injunction Act, however, is not required to qualify as an express authorization by Congress. *See Mitchum v. Foster,* 407 U.S. 225, 237, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). The

removal of litigation from state to federal courts is among the Acts of Congress in which the Supreme Court has found injunctive relief available in order for legislation to be given the import and scope intended by Congress.[4] *See id.* at 234-35 & n. 12. In addition, Congress added the phrase "in aid of its jurisdiction" to the statute in 1949 "to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts." Revisor's Note to 1948 Revision of Anti-Injunction Act, 28 U.S.C. § 2283.

While the exceptions to the Anti-Injunction Act provide an avenue around the Act's otherwise absolute prohibition, a federal court must also possess positive authority to enjoin state court proceedings. *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1019-20 (8th Cir. 2002). The All Writs Act provides that authority by empowering a federal court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998) ("If an injunction falls within one of [the exceptions to the Anti-Injunction Act], the All-Writs Act provides the positive authority for federal courts to issue injunctions of state court proceedings."). The Act enables a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the

4. The federal removal provisions provide that once a copy of the removal petition is filed with the clerk of the state court, the "State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d).

frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Pa. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40, 106 S.Ct. 355, 88 L.Ed.2d 189 (1985); *Miller v. Brooks (In re Am. Honda Motor Co.,)* 315 F.3d 417, 437 (4th Cir. 2003).

An injunction issued pursuant to the authority granted by the All Writs Act "is not subject to the four-factor balancing test ordinarily applicable to preliminary injunctions." *Scardelletti v. Rinckwitz*, No. 02-1013, 2003 U.S. App. LEXIS 13500, at *12, n. 3 (4th Cir. July 3, 2003); *see also Miller*, 315 F.3d at 442 (finding no abuse of discretion even though district court did not consider traditional four-prong analysis before issuing injunction under All Writs Act); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004) (stating that to obtain an All Writs Act injunction, a party "must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior"); *Harris v. Wells*, 764 F.Supp. 743, 745 (D.Conn. 1991) (stating that availability of an All Writs Act injunction is determined by the standards under the Act and not by the traditional standards for injunctive relief). An injunction under the All Writs Act does need to comply with the requirements of Federal Rule of Civil Procedure 65. *Scardelletti v. Debarr*, 265 F.3d 195, 212 (4th Cir. 2001), *rev'd on other grounds by Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). Specifically, the order granting an injunction "shall set forth the reasons for its issuance; shall be specific in terms; [and] shall

describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d).

B. *Fourth Circuit's Vacation of District Court's Order*

Having determined that a federal court has the authority to provide injunctive relief where removal has terminated the state court's jurisdiction, but the state court has not relinquished the suit, the court now must decide whether such a scenario exists in this case. In doing so, the court has to grapple with the unusual procedural posture presented: (1) Plaintiff filed suit in state court; (2) Defendant properly removed the suit to federal district court; (3) the federal district court dismissed Counts B and C and, declining to exercise supplemental jurisdiction, remanded Count A to state court; (4) Defendant appealed the federal district court's remand Order to the Fourth Circuit; (5) while on appeal, the suit proceeded in state court during which time the Complaint was amended; (6) over a year after the federal district court remanded the remaining claim, the Fourth Circuit vacated the district court's Order with instructions to dismiss the remaining claim; (7) the federal district court, per those instructions, dismissed the entire suit with prejudice; (8) Defendant filed a motion to dismiss in state court, noting the federal district court's final judgment; and (9) the state court denied Defendant's motion.

Appendix B

In returning to this court for injunctive relief, Defendant argues that the state court proceedings are a nullity and that, alternatively, Bryan's suit is barred by claim and issue preclusion. The court agrees with Defendant's first contention and, therefore, need not reach the preclusion arguments.

"The right to remove a case from state to federal court derives solely from 28 U.S.C. § 1441." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). A defendant may remove from state to federal court "any civil action brought in a state court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). District courts are granted "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "A proper filing of a notice of removal immediately strips the state court of its jurisdiction," *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 754 (4th Cir. 1996), and "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d); *see also Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1254-55 (11th Cir. 1988) (citing *Steamship Co. v. Tugman*, 106 U.S. 118, 122, 1 S.Ct. 58, 27 L.Ed. 87 (1882) ("[A]fter removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case. Any subsequent proceedings in state court on the case are void ab initio.").

In the case at bar, neither the propriety of the suit's initial removal, nor the proceedings of the state court

between removal and remand are in dispute. The controversy in this case centers around (a) the effect of the Fourth Circuit's vacation of this court's Order remanding Count A to the state court in relation to (b) the proceedings that took place in state court in the interim between those two decisions. Although no circuit has directly addressed this point, the Fifth Circuit contemplated such a scenario in *Sykes v. Tex. Air Corp.*, 834 F.2d 488, 490-91 (5th Cir. 1987). Underscoring the strong congressional policy against review of remand orders, the Fifth Circuit lamented that, "[i]f months or years later a federal Court of Appeals decides that the remand was improper, matters are thrown into confusion and the effort expended by the parties on the state court proceeding (along with a good deal of state judicial resources) is in jeopardy." *Id.* at 490.

The court elaborated that:

> [a]ppellate review of remand orders . . . is necessarily inefficient because of its peculiar binary quality: Either the remand is affirmed, in which case the appeal itself was a waste because it had no effect on the on-going state case; or the remand is reversed, in which case progress made in the state court proceedings may be nullified.

Id. at 491; *see also Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991) ("Remands are effective immediately, so state courts may get back to work on the cases. An appellate order a year or more later may

render this effort wasted."). In cases where remand is reversed or vacated, state court proceedings are not automatically nullified because federal courts are still obligated to grant "full faith and credit" to prior state court final judgments as well as intermediate judgments that are final in effect. *See* 28 U.S.C. § 1738; *Parsons Steel, Inc. v. First Ala. Bank,* 474 U.S. 518, 524, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986) ("once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision"); *see also Gates, Hudson & Assocs. v. Banks,* 1999 U.S. App. LEXIS 8341, *1-2 (4th Cir. Apr. 30, 1999) (citing *Sykes* for its discussion of the "'peculiar' quality of appellate review of remand orders" and acknowledging that full faith and credit would apply to state court's final judgment).

Under N.C. Gen.Stat. § 1A-1, Rule 54(a), "a judgment is either interlocutory or a final determination of the rights of the parties," and "a final judgment is one which disposes of the cause as to all parties, leaving nothing to be judicially determined between them in the trial court." *Hinson v. Hinson,* 17 N.C. App. 505, 508-09, 195 S.E.2d 98, 100 (1973). In the case at bar, the state court made two material decisions in this case since the district court's remand order: the first allowed Bryan to file an amended complaint in state court,[5] and the second denied BellSouth's motion to

5. It is not clear from the record whether Bryan amended by right or by leave of court. For purposes of this opinion, the court will assume that Bryan amended her Complaint by leave of the state court.

dismiss pursuant to N.C. Gen.Stat. § 1A-1, Rule 12(b)(6). The former occurred prior to the Fourth Circuit's vacation order, and the latter occurred after, but that temporal distinction is superfluous because neither is considered a final judgment under North Carolina state law. *See Estate of Spell v. Ghanem*, 622 S.E.2d 725, 727 (N.C. Ct. App. 2005) (holding that an order allowing amendment of plaintiffs' complaint is interlocutory); *Capps v. NW Sign Indus. of N.C., Inc.*, 171 N.C.App. 409, 411, 614 S.E.2d 552, 555 (N.C. Ct. App. 2005), *vacated on other grounds by* 627 S.E.2d 614 (N.C. 2006) (stating that denying a motion to dismiss is not a final determination as to the rights of the parties involved in the litigation). Therefore, this court does not owe "full faith and credit" to either of these state court decisions.

In the absence of such an obligation, the court finds that the vacation of its February 6, 2003 remand Order renders all state court proceedings since then a nullity in the case at bar. On a conceptual level, the "vacation of the judgment or order of the court below generally deprives such judgment or order of any effect." 5 Am. Jur. 2d *Appellate Review* § 846 (2006). Common usage of the term "vacate" indicates as much. *See Black's Law Dictionary* (8th ed. 2004) (defining vacate as "[t]o nullify or cancel; make void; invalidate"); *Webster's Ninth New Collegiate Dictionary* (1989) (defining vacate as "to make legally void; annul"). Case law is consistent with these conceptions. *See United States v. Ayres*, 76 U.S. (9 Wall.) 608, 610, 19 L.Ed. 625 (1869) ("the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in

the same situation as if no trial had ever taken place"); *In re Hakim*, 244 B.R. 820, 821-22 (Bankr. N.D. Cal. 1999) (noting that when an order of dismissal is vacated, all of its effects are vacated). For example, when presented with a case that is rendered moot while on appeal, appellate courts traditionally vacate the judgment below in order to wipe the slate clean and remove any precedential effect. *Md. Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1250 (4th Cir. 1991) (citing *United States v. Munsingwear*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950)); *Troy State Univ. v. Dickey*, 402 F.2d 515, 517 (5th Cir. 1968). As the Fifth Circuit stated in *Falcon v. General Telephone Co.*, "when a judgment is vacated all is effectually extinguished." 815 F.2d 317, 320 (5th Cir. 1987) (internal quotation marks omitted).

Because the vacation of this court's remand order results in the order having no effect, (1) the case at bar was never remanded, (2) the state court lacked subject matter jurisdiction over the proceedings, and (3) every order made in the state court is void ab initio. *See Steamship*, 106 U.S. at 122. As discussed in *Sykes*, the availability of appellate review of remand orders, although limited, creates the potential for waste of resources on both the part of the state court and the parties. The most commonly suggested remedy is a stay of state court proceedings while the appeal is pending. *See Stephens v. Am. Home Assurance Co.*, 811 F. Supp. 937, 957 (S.D.N.Y. 1993) (listing cases). The difficulty is in convincing a court to implement that remedy. The court in *Sykes* opined that finding a district court so

uncertain of a decision that it would stay its order to remand is highly unlikely.[6] 834 F.2d at 490. Hopefully, as a review of the case law indicates, the confluence of events presented here will remain rare. Nevertheless, in this instance, these events require a finding in favor of BellSouth.

II. Bryan's Motion to Dismiss

In response to BellSouth's effort to enjoin Plaintiff from pursuing her case in state court, Bryan offers multiple grounds upon which the court should dismiss or deny BellSouth's motion. First, Bryan argues that the court lacks subject matter jurisdiction to hear BellSouth's motion. Second, Bryan claims that BellSouth's motion ought to be treated as a new complaint and, as such, dismissed for insufficiency of both process and service of process. Third, Bryan asserts that BellSouth has failed to state a claim upon which relief can be granted. Finally, Bryan contends that notions of comity and tenets of the Anti-Injunction Act instruct that BellSouth's motion should be denied. The court will address these arguments seriatim.

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6. For example, in this case, the dissenting Fourth Circuit judge agreed with the district court that Count A did not arise under federal law and believed that remand of that matter to state court was proper. Moreover, motions to stay state court proceedings during the pendency of BellSouth's appeal were denied at least once by every court involved.

Appendix B

A. *Lack of Subject Matter Jurisdiction*

"The burden of proving subject matter jurisdiction on a motion to dismiss is on . . . the party asserting jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). The district court, however, should grant a Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). As Bryan correctly points out, the All Writs Act does not independently confer subject matter jurisdiction on federal courts. *Miller*, 315 F.3d at 437 (citing *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002)). Nor does qualifying for an exception to the Anti-Injunction Act fulfill any jurisdictional requirement. *See Smith v. Apple*, 264 U.S. 274, 278, 44 S.Ct. 311, 68 L.Ed. 678 (1924).

"It is well-settled that a federal court may exercise ancillary jurisdiction to enforce its judgments." *Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746, 752 (4th Cir. 2003) (citing *Peacock v. Thomas*, 516 U.S. 349, 354, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996)). While a federal court has the power to enforce its decisions, the Supreme Court has cautioned against the exercise of ancillary jurisdiction "over proceedings that are entirely new and original." *Peacock*, 516 U.S. at 358 (citation and internal quotation marks omitted). Ancillary jurisdiction "may extend to claims having a factual and logical dependence on the primary lawsuit, . . . but that primary lawsuit must

contain an independent basis for federal jurisdiction." *Id.* at 355 (citation and internal quotation marks omitted); *see also* 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4226 (2d ed. 1988) (stating that, in the context of the relitigation exception, the jurisdiction that the federal court had when it entered its original judgment is enough to support its issuance of an injunction).

For example, the Supreme Court in *Kokkonen v. Guardian Life Ins. Co.* concluded that enforcement of a settlement agreement was not dependent upon the dismissed suit and required independent jurisdiction. 511 U.S. 375, 378, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). In reaching that decision, the Court recognized two purposes for which it had "exercised ancillary jurisdiction in the past: '(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, . . . ; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.' " *Marino*, 349 F.3d at 752 (quoting *Kokkonen*, 511 U.S. at 379-80). As the Supreme Court stated in *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934):

> That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. And this,

> irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause.

In the case at bar, the district court had original jurisdiction over the suit because two (later determined by the Fourth Circuit to be all three) of the counts in Bryan's Complaint raised federal questions, and the suit was properly removed to the district court. Moreover, there is no question that BellSouth's motion for permanent injunction is factually and logically dependent upon the suit brought by Bryan against BellSouth.

"[A]ncillary jurisdiction exists in order that the court may do complete justice in the chief controversy." *Coop. Transit Co. v. West Penn Elec. Co.*, 132 F.2d 720, 723 (4th Cir. 1943). Complete justice includes enforcing an Act of Congress-that act, in this case, being Section 1446(d) of Title 28, which provides that once removal is effected, the state court shall proceed no further. Although the suit was remanded and state court jurisdiction revived, the Fourth Circuit's vacation of the remand order rendered all otherwise-valid state court proceedings void ab initio.[7] Because a suit exists in state court that never

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7. A significant portion of Bryan's arguments are devoted to the contention that this court has no jurisdiction over and has never ruled upon her Second Amended Complaint filed in state court after remand but before vacation. To the extent that

(Cont'd)

left the jurisdiction of this court after removal, this court can exercise ancillary jurisdiction to dispose of a factually interdependent claim, vindicate its authority, and protect its judgment.

B. *Insufficiency of Process, Insufficiency of Service of Process, and Failure to State a Claim Upon Which Relief Can Be Granted*

Bryan also argues that BellSouth's Motion "is better characterized as a pleading." (Pl.'s Mem. Supp. Mot. Dismiss Def.'s Mot. for Permanent Inj. (hereinafter "Pl.'s Mem. Supp.") at 8.) Bryan contends that: (1) "[o]nce this Court dismissed Plaintiff's First Amended Complaint and entered a Final Judgment, Plaintiff and Defendant were no longer parties before the Court," and (2) a "motion is an application for an order of relief in favor of the moving party to a lawsuit[;]" therefore, (3) "[w]ithout a plaintiff or an existing lawsuit, or at least retention of jurisdiction by a federal court, there can be no motions." (*Id.*) Bryan's argument contains several flaws.

First, Bryan cites Federal Rule of Civil Procedure 7(b)(1) as direct support for her definition of a motion. Contrary to Bryan's proposition, the text of Rule 7(b)(1)

(Cont'd)

Bryan's argument might have merit in the context of issue or claim preclusion, it is nevertheless inapposite to this court's determination that all state court proceedings, both between remand and vacation as well as subsequent to vacation, are a nullity.

does not make any reference to the term "lawsuit." The Rule simply states that "[a]n application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Civ. P. 7(b)(1). Next, Bryan's line of reasoning appears to presuppose that this court lacks subject matter jurisdiction to hear BellSouth's Motion. According to Bryan, "BellSouth filed a motion in an action no longer before the Court-where no jurisdiction has been explicitly retained by the Court and no adjudication of property by the Court is threatened." (Pl.'s Mem. Supp. at 8.) As discussed in the previous section however, this court does have ancillary jurisdiction over the instant matter. Finally, Bryan's reasoning actually renders her Rule 12(b)(4), (5), and (6) arguments moot. If, on the one hand, the court found that no jurisdiction existed and, therefore, BellSouth's motion was actually a pleading, then the matter would already have been dismissed for lack of subject matter jurisdiction. If, on the other hand, the court concludes that jurisdiction exists (as it has done), then the motion is proper.

For all of these reasons, BellSouth was not required to serve process in compliance with Federal Rule of Civil Procedure 4. In addition, having invoked the positive authority vested in the All Writs Acts and having satisfied an exception to the Anti-Injunction Act, BellSouth has stated a claim upon which relief can be granted.

Appendix B

C. *Comity and the Anti-Injunction Act*

Integrated within her Motion to Dismiss, Bryan argues that BellSouth's Motion ought to be denied because (1) she is not pursuing any claims in the First Amended Complaint, (2) this court has not ruled upon her Second Amended Complaint filed in state court, and (3) the state courts are more than competent to determine the preclusive effect of this court's Final Judgment.

As discussed in Part I.A., the purpose of the Anti-Injunction Act is to prevent federal courts from enjoining state court proceedings. The Act's allowance for three narrow exceptions, however, offsets some of the tension between the Act and

> the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."

England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909)); *see also County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959) (stating that abstention doctrine "is an

extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it") *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (noting the general rule that federal courts are bound by a "virtually unflagging obligation . . . to exercise the jurisdiction given them"). The obligation to exercise ancillary jurisdiction may not rise to the level of other jurisdictions granted to district courts. Still, a substantial duty exists, especially where the factors enunciated in *Kokkonen* are present. *See* 511 U.S. at 379-80.

According to Bryan, a permanent injunction would "usurp the state court's authority to litigate the state claims in the Second Amended Complaint" and "[t]o do so would violate principles of comity and the Anti-Injunction Act." (Pl.'s Mem. Supp. at 10.) In *Younger v. Harris*, the Supreme Court articulated that comity was a "vital" policy concern underpinning the prohibitions of the Anti-Injunction Act. 401 U.S. 37, 44 (1971). The Court elaborated on the notion of comity as:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept [represents] is a system in which there is

> sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

Had this matter turned on the issue of preclusion, the court would have been inclined, in an effort to avoid interfering with the "legitimate activities" of the state, to deny BellSouth's request for injunctive relief. Comity concerns for the activities of the state, however, are significantly lessened by the court's determination that those activities are null and without effect. *See In re James*, 940 F.2d 46, 52 (3rd Cir. 1991) ("vacating [a void] judgment is merely a formality and does not intrude upon the notion of mutual respect in federal-state interests"); *see also Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987) (holding the state court judgment void after determining that the jurisdictional basis of the state court action was lacking). Therefore, in this case, injunctive relief minimally offends notions of comity and federalism, while fulfilling the court's obligation to exercise its jurisdiction, vindicate its authority, and protect its judgments.

Appendix B

CONCLUSION

For the reasons set forth in this memorandum opinion, the court will deny Bryan's motion to dismiss. The court will grant BellSouth's motion to permanently enjoin Bryan from pursuing the claims alleged in Count A of her First Amended Complaint[8] in the Superior Court of Guilford County or any other state court in North Carolina. Likewise, Bryan will be permanently enjoined from pursuing the claims alleged in her Second Amended Complaint[9] in the Superior Court of Guilford County or any other state court in North Carolina. Nothing in this opinion or the accompanying order should be construed as preventing Bryan from filing a lawsuit alleging another state law claim (one which avoids challenging the validity of a filed tariff) against BellSouth in state court.

An order and permanent injunction in accordance with this memorandum opinion shall be entered contemporaneously herewith.

May 31, 2006

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8. Bryan's First Amended Complaint is identified as the complaint filed in the United States District Court for the Middle District of North Carolina on June 4, 2002.

9. Bryan's Second Amended Complaint is identified as the complaint filed in the Superior Court of Guilford County, North Carolina on August 8, 2003.

No. 07-458

FILED
NOV 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TOMI WHITE BRYAN, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR BELLSOUTH TELECOMMUNICATIONS, INC.

MARTIN E. GRAMBOW
LAURA J. COLEMAN
S. KENDALL BUTTERWORTH
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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly applied to the specific facts of this case the long-established rule of *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), reaffirmed in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), that federal-question jurisdiction exists when a plaintiff's state-law claim necessarily requires resolution of a substantial federal question.

2. Whether the Fourth Circuit correctly applied *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), to affirm an injunction under the relitigation exception to the Anti-Injunction Act, where the allegedly preclusive state-court decision was interlocutory and would have had no binding effect in state court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent BellSouth Telecommunications, Inc. states the following:

BellSouth Telecommunications, Inc. is an indirect subsidiary of AT&T Inc. AT&T Inc. is a holding company whose subsidiaries and affiliates provide wireline and wireless voice and data communications and directory publishing and advertising services and products in the United States and abroad. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition presents no question warranting review by this Court.

Petitioner first asserts that the Fourth Circuit erred in holding at a prior stage in this case that federal jurisdiction existed because her complaint necessarily required resolution of a substantial question of federal law. In this regard, petitioner does not argue that the Fourth Circuit adopted an incorrect rule of law, nor does she identify any court of appeals decision that conflicts with the decision below. Rather, she seeks review of the wholly fact-bound question whether the allegations in her particular complaint can be interpreted to seek relief that does not depend on federal law.

As an initial matter, the issue raised by petitioner is not properly presented here. The Fourth Circuit resolved the issue in a prior decision after which, on remand, a final judgment was issued against (and not appealed by) petitioner. In the current proceeding to enforce that judgment, petitioner's claim that the district court lacked federal court jurisdiction to enter the judgment in the first place is barred by established principles of *res judicata*.

Additionally, and in any event, although the petition does not acknowledge this fact, petitioner already sought certiorari on this same question in 2004 when the Fourth Circuit first concluded that federal jurisdiction existed,[1] and this Court denied review. *See Bryan v. BellSouth Telecomms., Inc.*, 543 U.S. 1187 (2005). Contrary to petitioner's argument, this

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[1] *See* Petition for a Writ of Certiorari, *Bryan v. BellSouth Telecomms., Inc.*, No. 04-705 (U.S. filed Nov. 22, 2004) ("*Bryan I* Pet.").

Court's intervening decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), does not change the applicable law on federal jurisdiction. The Court found that federal jurisdiction existed in that case and, in so doing, reiterated the established legal principles applied by the Fourth Circuit here.

Petitioner next contends that the Fourth Circuit misapplied this Court's decision in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986). In making that argument, petitioner ignores the fact, emphasized by the Fourth Circuit, that here the state court's denial of BellSouth's motion to dismiss was interlocutory. Under established North Carolina law, therefore, that state-court decision had no preclusive effect in either state court or federal court. By its terms, *Parsons Steel* applies only to "final[]" determinations of state courts, *id.* at 524, and thus, as the Fourth Circuit explained, does not preclude an injunction where, as here, the relevant decision was not entitled to res judicata effect under state law. *See* Pet. App. 16a-17a. In any event, petitioner again identifies no court of appeals decision that conflicts with the decision below – in fact, the Fourth Circuit decision here accords with the analysis of other courts of appeals, *see infra* p. 19 – and at best seeks correction of a purported error in the application of an undisputed rule of law to the particular facts of her case.

STATEMENT OF THE CASE

1. BellSouth, a provider of interstate telecommunications services, is subject to federal regulation as a common carrier under the federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* As relevant here, under the Communications Act, BellSouth must file with the Federal Communications Commission ("FCC") publicly available tariffs setting forth its charges. *See id.* § 203(a). BellSouth must also contribute a percentage of its revenues to the federal Universal Service Fund ("USF"), which subsidizes telecommunications services for schools, health-care providers, libraries, and rural and low-income customers. *See id.* § 254; 47 C.F.R. § 54.706(c).

The FCC has authorized carriers to recover the costs of USF contributions from their customers either through the rates they charge for telecommunications services or through a separate itemized charge. BellSouth has always recovered costs related to its contributions through a line-item charge on each customer's bill for a "Federal Universal Service Charge" ("FUSC"). *See* Joint Appendix at 159, *Bryan v. BellSouth Telecomms., Inc.*, No. 03-1316 (4th Cir. filed May 12, 2003) ("*Bryan I* 4th Cir. J.A."). BellSouth's federal tariffs, duly filed with the FCC, detail the amount of the FUSC, how the FUSC is calculated, and how it appears on customers' bills. The tariffs describe in detail both the calculation of BellSouth's contribution to the USF and how BellSouth arrives at the FUSC it charges to customers. *See id.* at 165-66 (examples of such calculations in BellSouth's March 18, 2002 tariff).

In a December 2002 order, the FCC adopted new rules, in force from April 2003 forward, that prohibited carriers from "marking up" their USF line items

and charging customers more than their pro rata share of the carrier's contribution. *See* Report and Order & Second Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952, ¶¶ 51-52 (2002). Although BellSouth never "marked up" its line-item charge, before April 2003 the FCC permitted carriers to charge customers on a non-pro rata basis, so long as carriers did not "shift more than an equitable share of their contributions to any customer or group of customers" and "provide[d] accurate, truthful, and complete information regarding the nature of the charge." *Id.* ¶ 10.

2. On February 22, 2002, petitioner filed this putative class action against BellSouth in the Superior Court of Guilford County, North Carolina, alleging that BellSouth's FUSC violated North Carolina's Unfair and Deceptive Trade Practices Act. BellSouth removed the action to federal court pursuant to 28 U.S.C. § 1331 and § 1441. Petitioner then filed an amended complaint in federal court, alleging that BellSouth's FUSC was excessive; that BellSouth did not disclose how it calculated the FUSC; and that BellSouth's use of the term "Federal Universal Service Charge" was misleading. BellSouth moved to dismiss on a number of grounds, including that the claims were barred by the filed-rate doctrine because they challenged BellSouth's filed tariff. The district court granted the motion to dismiss with respect to two of petitioner's three claims, but found that the third claim for unfair trade practices arose exclusively under state law. *See Bryan I* Pet. App. 37a-38a. The district court declined to exercise supplemental jurisdiction over that claim and remanded it to state court. *See id.* at 39a.

BellSouth appealed the district court's remand of the unfair trade practices claim to the Fourth Circuit; petitioner did not appeal the dismissal of the other two claims. While BellSouth's Fourth Circuit appeal was pending, the portion of the action that had been remanded proceeded in state court, with petitioner filing a second amended complaint.

3. In July 2004, the Fourth Circuit ruled in favor of BellSouth as to the lone claim that the district court had not dismissed. *See Bryan v. BellSouth Telecomms., Inc.*, 377 F.3d 424 (4th Cir. 2004) ("*Bryan I*"). The court of appeals held that petitioner's unfair trade practices claim, like her other two claims, challenged BellSouth's federal tariff and thus was barred by the filed-rate doctrine. *See id.* at 430-31. The court of appeals vacated the district court's remand order and returned the case to the district court with instructions to dismiss the unfair trade practices claim. *See id.* at 432.

In reaching that conclusion, the Fourth Circuit specifically applied this Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to conclude that there was federal jurisdiction over the unfair trade practices claim. As the court of appeals explained, "when, as here, state law creates the plaintiff's cause of action, the lower federal courts possess jurisdiction to hear 'only those cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Bryan I*, 377 F.3d at 428-29 (quoting *Franchise Tax Board*, 463 U.S. at 27-28) (ellipsis in original). In this instance, because a federal tariff has the force of federal law and petitioner's claim would necessarily require a deviation from the rate

established by that federal tariff, that claim necessarily required resolution of an issue of federal law under *Franchise Tax Board*. *See id.* at 430-31.

Although Judge Luttig dissented from the Fourth Circuit's resolution of this issue, he agreed with the majority that "claims requiring the court to second-guess the reasonableness" of the rate set forth in the tariff "are properly said to require the court to resolve a substantial federal question." *Id.* at 435. Judge Luttig disagreed only as to a case-specific issue: whether petitioner's complaint was plausibly read to seek damages other than a refund of the FUSC.

4. On November 22, 2004, petitioner petitioned for certiorari from *Bryan I*. She argued, among other things, that federal jurisdiction did not exist over her unfair trade practices claim. *See Bryan I* Pet. 10-15 (arguing that "Bryan's state law claims for violation of the [North Carolina unfair trade practices statute] do not state a claim for relief under federal law" and that the Fourth Circuit erred in "conclud[ing] that any measure of damage would require the trial court to determine the 'reasonable rate' BellSouth should have charged" under a federal tariff).

BellSouth opposed certiorari. With respect to the jurisdictional issue, BellSouth pointed out, among other things, that the Fourth Circuit had applied the settled standard of *Franchise Tax Board* and that petitioner at best sought review of the majority's fact-bound decision that her complaint required determination of the federal question. *See* Brief of Respondent in Opposition at 13-17, *Bryan v. BellSouth Telecomms., Inc.*, No. 04-705 (U.S. filed Jan. 26, 2005) ("*Bryan I* BIO") (in arguing that the Fourth Circuit erred because the complaint "does not in fact

seek a refund of the tariffed rate," petitioner "seeks mere correction of error"). BellSouth further noted that, although the Court had recently granted certiorari in *Grable & Sons* – the case on which petitioner now places primary emphasis – that case involved different issues and thus there was no reason to hold petitioner's petition pending the resolution of the distinct issue presented there. *See id.* at 14 n.13.

On February 28, 2005, the Court denied certiorari without awaiting the resolution of *Grable & Sons*. *See Bryan I*, 543 U.S. 1187; *see also Grable & Sons*, 545 U.S. 308.

5. Following the Fourth Circuit's remand, the district court dismissed the unfair trade practices claim and denied petitioner's motion to file a second amended complaint, entering final judgment in favor of BellSouth. The district court found that petitioner's proposed second amended complaint – which was substantively identical to petitioner's second amended complaint in state court – simply sought to reword the same unfair trade practices claim that had already been dismissed. *See* Joint Appendix at 117, *Bryan v. BellSouth Telecomms., Inc.*, No. 06-1746 (4th Cir. filed Sept. 6, 2006). Petitioner did not appeal the final judgment.

After the district court's entry of final judgment and this Court's denial of certiorari in *Bryan I*, BellSouth moved to dismiss in state court, arguing that the Fourth Circuit's vacatur of the district court's remand order rendered the remand order a nullity and deprived the state court of jurisdiction. *See id.* at 122. BellSouth also moved to dismiss the state action on the basis of res judicata, collateral estoppel, and the filed-rate doctrine. *See id.* at 120-23. The state court denied BellSouth's motion. *See id.* at 124.

Faced with the possibility of an inconsistent state-court judgment on the exact claim dismissed with prejudice by the federal court, BellSouth returned to the district court and sought an injunction of the state-court proceedings under the All Writs Act.

The district court granted the injunction. *See* Pet. App. 46a.

6. Petitioner appealed, and the Fourth Circuit affirmed the district court's decision. *See* Pet. App. 1a-22a. The court of appeals first rejected petitioner's argument that the district court lacked subject-matter jurisdiction to issue the injunction. The court of appeals observed that the district court had subject-matter jurisdiction when it issued the order finally dismissing the unfair trade practices claim, and that it retained jurisdiction to enforce that judgment. *See id.* at 7a.

Petitioner next argued that the injunction was inappropriate under the Anti-Injunction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Fourth Circuit held that this statute did not bar the injunction granted by the district court because this case fell within the Anti-Injunction Act's "relitigation" exception for injunctions necessary "to protect or effectuate" a federal court's judgment. The court of appeals concluded that "Bryan in the state-court action is seeking to litigate the very claim that we have concluded must be dismissed under the filed-rate doctrine." Pet. App. 15a.

The Fourth Circuit then explained that its resolution of this issue was consistent with this Court's

decision in *Parsons Steel* – a case that petitioner had not cited in her brief, but that BellSouth had noted and distinguished in its brief as appellee. *See* Brief of Appellee BellSouth Telecommunications, Inc. at 31-33, *Bryan v. BellSouth Telecomms., Inc.*, No. 06-1746 (4th Cir. filed Oct. 6, 2006). In *Parsons Steel*, this Court held that the Anti-Injunction Act did not create an exception to the Full Faith and Credit Act, which requires a federal court to give a state-court judgment the same preclusive effect it would have in another court of that state: "Once the state court has *finally* rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." 474 U.S. at 524 (emphasis added).

The Fourth Circuit reasoned that, under *Parsons Steel*, it was required to consider whether the North Carolina court's decision would be entitled to res judicata effect under North Carolina law. *See* Pet. App. 17a. The court of appeals determined that the state-court decision did not have such preclusive effect, because North Carolina requires a "final judgment on the merits" for res judicata and does not classify an order denying a Rule 12(b)(6) motion to dismiss as a final judgment. *See id.* (internal quotation marks and emphasis omitted). Accordingly, the Fourth Circuit concluded that an injunction against further prosecution of petitioner's state-court action was consistent with the All Writs Act, the Anti-Injunction Act, and the Full Faith and Credit Act. *See id.*

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S FINDING OF FEDERAL JURISDICTION INVOLVES A STRAIGHTFORWARD AND CORRECT APPLICATION OF THE ESTABLISHED PRINCIPLES OF *FRANCHISE TAX BOARD* TO THE FACTS OF THIS CASE

In its recent decision, the Fourth Circuit concluded that the district court had subject-matter jurisdiction to issue its injunction because federal courts have jurisdiction to enforce their own judgments. Petitioner does not challenge that ruling. Rather, petitioner argues that the federal district court lacked jurisdiction to issue its original judgment and therefore lacked jurisdiction to protect its judgment through an injunction. That argument (which was not even made to the Fourth Circuit during the most recent appeal) lacks merit and, in fact, is one on which the Court *already* denied certiorari when petitioner sought review of *Bryan I*.

A. As an initial matter, petitioner's argument is barred by well-established principles of res judicata. After the Fourth Circuit's remand in *Bryan I*, the district court entered a final judgment finding subject-matter jurisdiction over petitioner's remaining state-law claim and dismissing the claim with prejudice. Petitioner did not appeal from that final judgment, which accordingly became entitled to res judicata effect. Petitioner cannot contest the district court's injunction to enforce its judgment by collaterally attacking the original judgment as one that the court lacked jurisdiction to enter.

A final judgment is ordinarily not subject to collateral attack in a subsequent proceeding to enforce the judgment. That principle applies even when

the subject-matter jurisdiction of the initial court is called into question. *See, e.g.*, Restatement (Second) of Judgments § 12 (1982); *Baella-Silva v. Hulsey*, 454 F.3d 5, 9-10 (1st Cir. 2006) (on appeal from district court's order imposing sanctions for breach of settlement agreement, plaintiffs could not collaterally attack settlement judgment on ground that district court lacked subject-matter jurisdiction); *Mitchell v. Commission on Adult Entm't Establishments*, 12 F.3d 406, 408-09 (3d Cir. 1993) (state could not challenge on Eleventh Amendment grounds order imposing statutory costs based on adverse judgment when state failed to appeal from original judgment); *see also Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (collecting cases holding that parties may not challenge a district court's final judgment for lack of subject-matter jurisdiction through a motion to vacate under Federal Rule of Civil Procedure 60(b)(4)). "This Court has long recognized that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.'" *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)) (alteration in original). Thus, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

B. Even if petitioner's argument were not barred, she provides no plausible basis for this Court to revisit its decision to deny review on this same question.

In Bryan I, the Fourth Circuit determined that petitioner's unfair trade practices claim arose under federal law because her "'right to relief necessarily depend[ed] on resolution of a substantial question of federal law.'" 377 F.3d at 429 (quoting *Franchise Tax Board*, 463 U.S. at 27-28). Although petitioner conceded that the Fourth Circuit, relying on *Franchise Tax Board*, had identified the existence of a "substantial question of federal law" as the basis for jurisdiction, she argued that no such question "appear[ed] in [the] complaint" in her case, *Bryan I* Pet. 12, because, she claimed, she had not sought damages that would effectively alter the filed federally tariffed rate. *See, e.g., id.* at 13 ("A damage measure superimposed upon the Complaint by a defendant or a Court cannot form the basis for federal question jurisdiction.").[2] In response, BellSouth demonstrated that this argument lacked merit because "a plain reading of the complaint makes clear that petitioner seeks the precise relief she now disclaims," and, in any event, involved a case-specific application of settled legal principles. *Bryan I* BIO 13-17. As noted, the Court denied certiorari.

In her current petition, petitioner again claims that the Fourth Circuit erred in determining in *Bryan I* that "Bryan's amended complaint arose under federal law because it presented a substantial question of federal law." Pet. 10. In seeking to revive the same claim as to which the Court previously denied review, petitioner now argues primarily that certiorari

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[2] Petitioner also contended that the Fourth Circuit relied on a complete-preemption theory of federal-question jurisdiction. *See Bryan I* Pet. 11-12. In response, BellSouth demonstrated that the Fourth Circuit had in fact disclaimed such a theory. *See Bryan I* BIO 12-13; *see also infra* p. 16.

is warranted because, under this Court's more recent decision in *Grable & Sons*, she "has not pleaded a federal cause of action." *Id.*

That argument lacks merit. As an initial matter, this Court granted review in *Grable & Sons* while the *Bryan I* petition was still pending, and thus the Court could have held *Bryan I* pending its resolution of that matter. BellSouth, however, demonstrated that *Grable & Sons* had no relevance to the prior petition raising this same issue and thus that there was no reason to hold the *Bryan I* petition, *see Bryan I* BIO 14 n.13, and the Court denied certiorari without awaiting the resolution of *Grable & Sons*.

In any event, nothing about *Grable & Sons* casts doubt on the Fourth Circuit's decision. First, as the Court itself has made clear, it granted review in *Grable & Sons* to resolve a conflict between the circuits as to whether a court could premise federal jurisdiction on a violation of a federal statute *that did not provide a private right of action*. *See* 545 U.S. at 311-12 (explaining that the Court granted review "to resolve a split within the Courts of Appeals" as to whether there must "always" be a "federal cause of action as a condition for exercising federal-question jurisdiction"). The federal Communications Act, however, *does* provide a private cause of action. *See* 47 U.S.C. §§ 206, 207. Congress has thus expressed its view that questions involving violations of the Communications Act, or challenges to tariffs given the force of law by the Communications Act, are "substantial" enough to belong in federal court. Thus, the issue posed in *Grable & Sons* is simply irrelevant to the Fourth Circuit's decision.

Moreover, *Grable & Sons* resolved the split among the circuits as to that distinct issue in *favor* of federal

jurisdiction. *Grable & Sons* reaffirmed the possibility of jurisdiction under *Franchise Tax Board* even in cases where the federal statute at issue does not provide a private cause of action. As the Court explained, it has "recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." 545 U.S. at 312. *Grable & Sons* emphasized the "constant refrain" in early cases, and in *Franchise Tax Board* itself, that federal jurisdiction demanded a "substantial" federal issue and depended on a "'welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.'" *Id.* at 313-14 (quoting *Franchise Tax Board*, 463 U.S. at 8). Those statements hardly provide a basis to question the Fourth Circuit's conclusion in *Bryan I* that this particular case – where, the court of appeals concluded, relief would necessarily alter federally tariffed rates – implicates sufficient federal interests to support federal jurisdiction.

Petitioner also briefly discusses (at 14-15) this Court's 2006 decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006), but that case likewise provides no basis for review here. There, the Court granted certiorari to resolve a split among the circuits regarding whether federal jurisdiction existed over a health insurance carrier's contract-derived reimbursement claim. *See id.* at 2130. The Court held that Empire's reimbursement claim was not a "creature of federal law" and that, examining the particular statute at issue (the Federal Employees Health Benefits Act of 1959, or "FEHBA"), if Congress had intended these contract-based claims to be litigated in federal court, Congress

would have explicitly extended federal jurisdiction to them. *I* t 2134-35. Here, however, a tariff filed under the Communications Act *is* a creature of federal law, not an ordinary contract. *See, e.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998); *Western Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *see also Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (federal jurisdiction exists over suit to recover under federal tariff); *Louisville & N.R.R. Co. v. Rice*, 247 U.S. 201, 203 (1918) (same). Moreover, as discussed above, the Communications Act, unlike FEHBA, *does* create a private cause of action. Thus, the circuits uniformly agree that a suit to alter or enforce a telecommunications tariff arises under federal law and is properly pursued in federal court. *See, e.g., Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315-17 (11th Cir. 2004) (state-law claims for fraud and unfair trade practices raised substantial questions of federal law under a filed tariff); *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 478 (9th Cir. 2000) (action arising from a filed tariff presents a federal question); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 486, 488-49 (7th Cir. 1998) (suit to enforce or to invalidate a tariff arises under federal law); *see also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227 (1998) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.") (internal quotation marks omitted).

Petitioner nevertheless argues that her claims raise no "federal issue" because, in her view, the FCC allegedly has "determined that USF mark-ups such

as those imposed by BellSouth on its customers are unreasonable." Pet. 12. Contrary to petitioner's apparent belief, however, the fact that her argument necessarily turns on her understanding of a federal agency's decision regarding the reasonableness of federally tariffed rates strongly confirms that the Fourth Circuit correctly understood petitioner's claims to be inherently federal in nature.

Petitioner also recycles from her prior petition, *see supra* note 2, the argument that Congress did not intend completely to preempt state claims in the Communications Act. *See* Pet. 13-14. But that argument remains irrelevant: the Fourth Circuit made plain that it did not rely on the doctrine of complete preemption. *See Bryan I*, 377 F.3d at 429 n.5 ("[W]e need not determine whether the doctrine of complete preemption applies."). For that reason, the only two court of appeals cases that petitioner cites in relation to her first question presented in no way conflict with the Fourth Circuit's decision. *See* Pet. 14 (citing *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627 (6th Cir. 1987)). Those decisions conclude only that the Communications Act did not completely preempt state law in the field of telecommunications, an issue that the Fourth Circuit disclaimed addressing.

C. In the end, petitioner is simply repeating the same fact-bound claim of error as to which this Court has already denied certiorari. Petitioner does not claim that the Fourth Circuit articulated an incorrect rule of law in evaluating jurisdiction under *Franchise Tax Board*, or that any court of appeals decision conflicts with the decision below. Rather, she argues (at 11-13) that she did not in fact seek a "refund" of the

tariffed FUSC rate or challenge the filed rate. But the Fourth Circuit found that the complaint could not be interpreted to seek any damages other than such a refund. *See supra* pp. 5-6. To the extent petitioner contends otherwise, she is at best quibbling with the Fourth Circuit's resolution of the entirely fact-bound question of how to read her particular complaint. In any event, even if the complaint by its terms did not demand a refund of the FUSC, *any* damages awarded to petitioner would effectively lower the tariffed rate in a manner inconsistent with federal law. *See, e.g., Hill*, 364 F.3d at 1316; *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994); *Taffet v. Southern Co.*, 967 F.2d 1483, 1489 (11th Cir. 1992) (en banc); *see also Bryan I*, 377 F.3d at 430-31 (noting that other circuits had accepted this argument, but finding it unnecessary to rely on it).

II. THE FOURTH CIRCUIT'S UNDERSTANDING OF THE ANTI-INJUNCTION ACT WAS CORRECT AND RAISES NO ISSUE WARRANTING REVIEW BY THIS COURT

The Fourth Circuit affirmed the district court's grant of an injunction under the relitigation exception to the Anti-Injunction Act, which permits a district court to enjoin "'state litigation of an issue that previously was presented to and decided by the federal court,'" and is "'founded in the well-recognized concepts of res judicata and collateral estoppel.'" Pet. App. 8a (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)). The court of appeals first rejected petitioner's argument that the claim she asserted in state court was different from the claim dismissed under the filed-rate doctrine by the district court. *See id.* at 9a-15a. Next, the court of appeals

found that the injunction was consistent with the Full Faith and Credit Act and with *Parsons Steel*, because the state court's earlier ruling on the res judicata issue was interlocutory and was not entitled to preclusive effect under state law. *See id.* at 15a-17a. Petitioner challenges only the second ruling.

In *Parsons Steel*, this Court held that the relitigation exception to the Anti-Injunction Act applied only "to those situations in which the state court has not yet ruled on the merits of the res judicata issue": "Once the state court has *finally* rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." 474 U.S. at 524 (emphasis added).

The Fourth Circuit faithfully applied this Court's decision. As *Parsons Steel* directs, the court of appeals "turn[ed] to state law to determine the preclusive effect of the state court's decision." *Id.* In particular, the Fourth Circuit determined that, under state law, the state court's decision at issue here – a denial of a motion to dismiss – was not entitled to preclusive effect. *See* Pet. App. 17a (discussing requirements for preclusion under North Carolina law). The court of appeals then determined that North Carolina law requires a "final judgment on the merits" for res judicata and that an order denying a motion to dismiss was not a "final judgment or order" under North Carolina law. *Id.* (internal quotation marks and emphasis omitted). Accordingly, the Fourth Circuit concluded that a North Carolina court would not be obliged to give res judicata effect to the denial of BellSouth's motion to dismiss, and

thus neither was the district court under *Parsons Steel*. *See id.*

Petitioner does not dispute either that the state-court order was interlocutory or that it would not be given preclusive effect under state law. Instead, petitioner simply ignores that the *Parsons Steel* rule comes into play only when a state court has "*finally* rejected a claim of res judicata" – which plainly did not occur here – and requires only that federal courts give state-court judgments "the same full faith and credit" or preclusive effect "as they have by law or usage in the courts of such State," 28 U.S.C. § 1738 (Full Faith and Credit Act). Indeed, that key language from *Parsons Steel* is mentioned nowhere in her petition. Petitioner's argument is thus unavailing.

Nor does petitioner claim that there is a circuit conflict on this issue. In fact, the Fourth Circuit's holding is fully consistent with other circuits' determinations as to the preclusive effect in these circumstances of interlocutory state-court decisions. *See, e.g., Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 828-89 (5th Cir. 2006) (state court's interlocutory denial of motion to dismiss was not preclusive under state law, and therefore *Parsons Steel* did not forbid a federal court from enjoining the state-court proceedings); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (state court's denial of summary judgment on res judicata issue was not entitled to preclusive effect under state law, and therefore district court properly issued injunction under relitigation exception).

In sum, review is not warranted here both because the Fourth Circuit's decision was correct on this issue

and because, in any event, the petition at best seeks fact-bound error correction with respect to the Fourth Circuit's application of the undisputed rule of law established in *Parsons Steel*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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